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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners,

v.

ROBERT P. CASEY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS, THE NATIONAL LEAGUE FOR NURSING, AND THE NATIONAL MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* (1982) 21

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are seven national organizations of physicians and other health care professionals. Each *amicus* is dedicated to promoting public health by maintaining the highest professional standards and providing or ensuring the provision of quality health care.[1]

Amici's interest in this case stems from their concern about the profound impact that recently enacted state abortion laws will have on the lives and health of the female patients that their members serve. As individuals, *amici*'s members hold differing views on the religious and philosophical issues that abortion raises. They agree, however, that when a patient seeks medical care and treatment, such as abortion, state laws should not interfere with a health care provider's ability to exercise his or her best medical judgment in treating that patient. Because the Pennsylvania statute challenged here seriously interferes with a woman's ability, in consultation with her physician, to obtain an abortion, and because the standard of review adopted here will affect the constitutionality of other statutes affecting the lives and health of *amici*'s patients, *amici* wish to present their views.[2]

MEDICAL BACKGROUND

Elective abortion, defined as the termination of a pregnancy before the fetus has reached the stage of viability, is one of the most common medical procedures performed in the United States today.[3] Approximately 1.5 million American women obtain an abortion each year.[4]

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[1] *See* Appendix A for a brief description of each *amicus*.

[2] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

[3] *Williams Obstetrics* 501 (F. Cunningham et al., 18th ed. 1989); Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 83 (1986). Viability refers to the point at which the fetus would have a reasonable potential for survival if it were removed from the pregnant woman's uterus. *Williams Obstetrics* at 501.

[4] R. Gold, *Abortion and Women's Health* 11 (1990).

When performed correctly by trained and experienced physicians, abortion is a relatively safe procedure. Indeed, it is far safer than childbirth: The risk of dying from an abortion is currently about one-tenth the risk of dying during childbirth.[5] Illegal abortions, however, are substantially riskier than legal abortions. Prior to this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), complications from illegal abortions constituted a "serious public health problem, especially for the poor and minorities."[6] Although precise data are unavailable, statistics from this era suggest that the overall death rate from illegal abortions was about eight times greater than that for legal abortions,[7] and that the rate was even higher among minority women.[8] The incidence of non-fatal complications from illegal abortions also was extraordinary.[9]

The high mortality rate for illegal abortions is not surprising given the techniques that many women used—and in some cases, continue to use—to abort their fetuses.[10] These include ingesting Chlorox, turpentine or massive doses of quinine, or inserting such objects as coat hangers, knitting needles, or tree bark into their uteruses.[11]

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[5] R. Gold at 28-29; Dorfman, *Maternal Mortality in New York City, 1981-1983*, 76 Obstet. & Gynec. 317, 320 (1990).

[6] W. Hern, *Abortion Practice* 21 (1984).

[7] Cates & Rochat, *Illegal Abortions in the United States: 1972-74*, 8 Fam. Plann. Persp. 86, 91-92 (1976).

[8] R. Gold at 5 (minority women twelve times more likely than white women to die from such abortions).

[9] In 1962, for example, nearly *1,600* women were admitted to one New York City hospital for treatment of non-fatal complications of abortions. *Id.* at 6.

[10] Even after *Roe* some women continue to seek illegal abortions because legal abortions are either too expensive or not readily available or because of a variety of cultural, religious or personal reasons. Binkin et al., *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plann. Persp. 163 (1982).

[11] Polgar & Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 Fam. Plann. Persp. 125, 126 (1976).

Because legal abortions are so much safer than illegal ones, abortion-related deaths and other complications dropped sharply after the widespread legalization of abortion.[12] However, such serious medical problems as infection, hemorrhage, perforation of the uterus, or even death, still complicate about 0.5% of all abortions.[13] While the risk of such complications is relatively small, "*any* delay increases the risk of complications to a pregnant woman who wishes an abortion. Moreover, this risk appears to increase continuously . . . as the length of gestation increases." [14] After eight weeks of gestation, the risk of maternal death *doubles* with every two weeks of delay,[15] and the risk of other health complications increases at a rate of about 20% per week.[16]

Delays—and the concomitant increase in risk—are of particular concern for women with pre-existing medical conditions that may be exacerbated by pregnancy.[17] De-

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[12] For example, 39 deaths from unlawful abortions were reported nationwide in the year preceding this Court's decision in *Roe*, while only five deaths were reported in the following year. Cates & Rochat at 87. Similarly, non-fatal complications of abortion also declined after legalization. *See, e.g.*, Bracken et al., *Hospitalization for Medical-Legal and Other Abortions in the United States 1970-1977*, 72 Am. J. Pub. Health 30, 30 (1982) (hospital admissions for septic abortions in California dropped by 68-75% following liberalization of that state's abortion law in 1967).

[13] Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 16 (1985).

[14] Cates et al., *The Effect of Delay and Method of Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 268 (1977); Buehler et al. at 16.

[15] *Williams Obstetrics* at 506.

[16] C. Tietze & S. Henshaw, *Induced Abortion: A World Review, 1986* 103 (6th ed. 1986).

[17] These conditions include congenital malformations of the heart and its valves, cancer, chronic renal failure, multiple sclerosis, asthma, arthritis, inflammatory bowel disease and epilepsy. *See* D. Danforth & J. Scott, *Obstetrics & Gynecology* 494-97 (5th ed. 1986); *Rovinsky & Guttmacher's Medical, Surgical & Gynecological*

lays are also problematic for pregnant adolescents. Unlike older women, many teenagers—because of irregular menses, lack of experience with health care facilities, and difficulty in paying for medical care—wait until late in their pregnancies, often well into their second trimester, before seeking any medical care.[18]

SUMMARY OF ARGUMENT

I.

The threshold question in this case concerns the standard of review. In *Roe* v. *Wade*, 410 U.S. 113 (1973), *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), this Court held that strict scrutiny applies to all statutes that interfere with a woman's right, in consultation with her physician, to choose whether or not to terminate her pregnancy. The court of appeals, however, held that strict scrutiny should apply only to state regulations that severely interfere with or present absolute obstacles to a woman's right to choose an abortion. Pet. App. 14a, 30a.

This Court should put to rest the current confusion over the standard of review by reexamining and then reaffirming its prior holdings that a woman has a fundamental right to decide whether or not to have an abortion. Recognition of this right follows logically and ineluctably from this Court's decades-old recognition that the liberty protected from state interference by the Fourteenth Amendment includes the right to make personal choices regarding family life, marriage, and procreation. This

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Complications of Pregnancy 73 (S. Cherry et al., 3d ed. 1985); Williams & Bitran, *Cancer & Pregnancy*, 12 Clin. Perinat. 609 (1985); Noronha, *Neurological Disorders During Pregnancy and the Puerperium*, 12 Clin. Perinat. 695 (1985).

[18] Koonin et al., *Abortion Surveillance, United States, 1988*, 40 Morbid. & Mortal. Weekly Rep't 15, 17 (July 1991).

Court should also reaffirm that states may not regulate that right in ways that increase the health risks that pregnant women face.

None of the objections to *Roe* provides a basis for overturning two decades of constitutionally required protection for women's health. The principle that the state may not force a woman to accept increased health risks in order to further the state's interest in preserving fetal life is not arbitrary. To the contrary, that principle is fully supported by basic common law principles respecting the autonomy and bodily integrity of each individual. Nor is there any reason to think that reversing *Roe* will extricate federal courts and this Court from the need to review state abortion legislation. In fact, altering the standard of review will simply initiate another protracted legal battle over which new restrictions are constitutional.

II.

By enacting the Abortion Control Act Amendments of 1989, Pennsylvania has again passed a statute that will delay, discourage, and defeat women in their attempt to obtain a medically provided abortion. The specific provisions at issue here place a variety of obstacles—notification, consent, waiting periods and public disclosure—in the path of a woman seeking an abortion. Each will operate to increase the risks to the health of pregnant women. As was the case with Pennsylvania's previous abortion amendments, "[c]lose analysis . . . shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make." *Thornburgh*, 476 U.S. at 759. Indeed, these provisions violate our most basic notions of liberty by subjecting individuals to significant health risks solely to further the state's interest in protecting potential life. Each therefore is unconstitutional.

ARGUMENT

I. THIS COURT SHOULD REAFFIRM THAT A WOMAN'S RIGHT TO CHOOSE WHETHER OR NOT TO CARRY A PREGNANCY TO TERM IS A FUNDAMENTAL RIGHT PROTECTED AGAINST STATE INTERFERENCE BY THE GUARANTEE OF LIBERTY IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court held that the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." Accordingly, this Court held that state laws that interfere with this right are subject to strict scrutiny. *Id.* at 162-64. In the nearly two decades since *Roe* was decided, this Court has repeatedly reaffirmed this fundamental holding.[19]

More recently, however, members of the Court, in separate and plurality opinions, have questioned the trimester-based framework set forth in *Roe* as applied to particular state laws.[20] Relying on these opinions, the court below held that "the strict scrutiny legal standard endorsed by the Court in *Roe*, *Akron*, and *Thornburgh*" is no longer the applicable standard of review. Pet. App. 24a. Instead, the court held, the correct standard is one that applies strict scrutiny only to those state regulations that "impose an undue burden [on a woman's abortion decision] and rational basis review to those which do not." *Id.* at 30a.

This Court should reaffirm that a woman's right to decide whether or not to carry her pregnancy to term is a fundamental right protected against state interference

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[19] *E.g.*, *Thornburgh*, 476 U.S. at 747; *Akron*, 462 U.S. at 416.

[20] *See, e.g.*, *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 517-21 (1989) (opinion of Rehnquist, C.J.); *id.* at 525-31 (opinion of O'Connor, J.); *id.* at 532-37 (opinion of Scalia, J.).

by the guarantee of liberty in the Due Process Clause of the Fourteenth Amendment. This Court also should reaffirm that states may not regulate that right in ways inconsistent with accepted medical practice. Less stringent standards that allow states to interfere with this fundamental right are inconsistent with basic constitutional principles and will only provoke a new round of constitutional line-drawing. States have no interest sufficiently compelling to deny pregnant women the personal liberty enjoyed by all other persons to obtain medical treatment and to preserve their health free from state interference.

A. A Woman's Right To Choose Whether Or Not To Carry A Pregnancy To Term Is A Fundamental Right.

Prior to *Roe*, the Court had not considered the constitutionality of abortion laws. But like any proper "decision of an apparently novel claim," *Roe* took " 'its place in relation to what went before and further [cut] a channel for what [was] to come.' " *Poe* v. *Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting) (citation omitted).

Roe followed, in the first instance, "[t]his Court['s] . . . long recogni[tion] that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974). By 1923, this Court had recognized that "the liberty thus guaranteed . . . denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Over the five decades between *Meyer* and *Roe*, the Court invalidated state laws that infringed the right to choose whether to send one's children to a private school,[21] to

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[21] *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

marry someone of one's choice,[22] to refuse sterilization,[23] and to obtain and use contraceptives.[24]

At the core of the liberty protected from state interference, then, has been "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).[25] The right in question in *Roe*, "a woman's decision whether or not to terminate her pregnancy," 410 U.S. at 153, is inextricably part of the web of intensely personal choices in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education"[26] that the Court had previously protected.

The right recognized in *Roe* also has another important common law and constitutional antecedent. It follows directly from the common law tradition that protects the autonomy of each individual to decide what medical treatments to accept or to refuse. "Before the turn of the century, this Court observed that '[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or in-

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[22] *Loving* v. *Virginia*, 388 U.S. 1 (1967).

[23] *Skinner* v. *Oklahoma*, 316 U.S. 535, 536 (1942) (state law infringes on "the right to have offspring").

[24] *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (married couples); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (any individual); *see also Poe* v. *Ullman*, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting).

[25] Additional rights encompassed within the liberty protected by the Fourteenth Amendment include, *inter alia*, the right to travel, *Kent* v. *Dulles*, 357 U.S. 116, 125-27 (1958); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); and the right to pursue an occupation, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589 (1897).

[26] *Paul* v. *Davis*, 424 U.S. 693, 713 (1976).

terference of others, unless by clear and unquestionable authority of law.' " [27] This common law "notion of bodily integrity" underlies the requirement of informed consent for medical treatment.[28] Respect for bodily integrity has led state courts to refuse to order individuals to put their own health at risk or otherwise to suffer a bodily invasion (such as an operation) even when such an effort is necessary to save the life of another person.[29] It has also led this Court to invalidate state laws that would have compelled individuals to undergo physically invasive procedures in furtherance of the state's interest in investigating crime.[30] The right to have the state respect each individual's bodily integrity is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," [31] and therefore provides a second constitutional and common law antecedent to a woman's right to choose not to carry a pregnancy to term.

B. This Court Should Reaffirm That State Abortion Laws That Depart From Accepted Medical Practice And Increase Health Risks To Pregnant Women Are Unconstitutional.

In *Roe*, this Court held that courts should apply strict scrutiny to state laws regulating abortion, and provided an analytical framework based on the trimesters of preg-

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[27] *Cruzan* v. *Director, Missouri Dep't of Health*, 110 S. Ct. 2841, 2846 (1990) (quoting *Union Pac. R.R.* v. *Botsford*, 141 U.S. 250, 251 (1891)).

[28] *Cruzan*, 110 S. Ct. at 2846-47.

[29] *See infra* pp. 11-12 & nn. 37, 40.

[30] *See, e.g., Winston* v. *Lee*, 470 U.S. 753, 763-66 (1985) (state may not compel criminal defendant to undergo minor surgery to remove bullet); *Schmerber* v. *California*, 384 U.S. 757, 772 (1966); *Rochin* v. *California*, 342 U.S. 165, 173-74 (1952).

[31] *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934); *see also Palko* v. *Connecticut*, 302 U.S. 319, 324 (1937) (rights that are "implicit in the concept of ordered liberty" are immune from state interference).

nancy to assist courts in performing that analysis.[32] As the court of appeals explained, a majority of the members of the Court, through separate opinions, has taken the view that the trimester analysis is problematic. Pet. App. 24a-30a. *Amici* believe that the framework provided in *Roe* has proved useful to lower courts and that the Court should not abandon that framework.

Any dispute over the trimester framework, however, should not obscure the fundamental principle that underlies *Roe*. That principle is that states are not free to require individuals, including pregnant women, to subject themselves to increased health risks or significant intrusions of their bodily integrity in order to further the state's interest in the potential or actual life of another person.

This principle—which forbids states to "requir[e] a trade-off between the woman's health and fetal survival" —is not dependent on trimesters of pregnancy for implementation.[33] It simply looks to the impact of abortion regulation on women's health. Laws that "depart from accepted medical practice" should presumptively be unconstitutional, because such departures likely will pose a risk to the patient's health. *Akron*, 462 U.S. at 431.

This principle is consistent with the cases decided since *Roe*. Thus, this Court has upheld laws that legitimately furthered maternal health[34] or that placed no obstacles

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[32] Specifically, the Court held that a state has a compelling interest in protecting maternal health beginning at the second trimester of pregnancy, and a compelling interest in preserving the potential life of the fetus beginning at the time of viability, roughly coincident with the third trimester. 410 U.S. at 162. State laws that are not reasonably related to these interests or that sweep more broadly than necessary to further those interests therefore are unconstitutional. *Id.* at 163-64.

[33] *Thornburgh*, 476 U.S. at 768; *see also Colautti* v. *Franklin*, 439 U.S. 379, 387-401 (1979); *Roe*, 410 U.S. at 164.

[34] *See, e.g., Simopoulos* v. *Virginia*, 462 U.S. 506 (1983) (per curiam); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975).

in a woman's path to an abortion.[35] The Court, however, has invalidated laws that, "under the guise of protecting maternal health or potential life," have served in fact to increase the risk to maternal health by introducing needless delay into the process or otherwise by interfering with the relationship between patients and their physicians or nurses.[36]

The existence of a competing state interest in preserving fetal life is not sufficient to require departure from this basic principle. Common law principles illustrate the point. The common law imposes no general duty upon individuals to rescue others from life-threatening peril. Restatement (Second) of Torts §§ 314-15 (1965). In particular, states have not required individuals to undergo surgery, or to donate tissue, blood or organs, in order to save the actual life of another person.[37] Certainly this is true of Pennsylvania. In *McFall* v. *Shimp*, 10 Pa. D. & C.3d 90 (County Ct. Allegheny 1978), a Pennsylvania court refused to order the defendant to donate bone marrow needed to save the life of his cousin: "For our law to *compel* defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so

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[35] *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490 (1989); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977).

[36] *Thornburgh*, 476 U.S. at 759; *see, e.g., Akron*, 462 U.S. at 416; *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Doe* v. *Bolton*, 410 U.S. 179 (1972).

[37] *See, e.g., Bonner* v. *Moran*, 126 F.2d 121 (D.C. Cir. 1941) (surgery upon one person without consent to save the life of another is battery); *Curran* v. *Bosze*, 566 N.E.2d 1319, 1331 (Ill. 1990) (parent may not give consent on behalf of minor for donation of bone marrow to sibling unless to do so would be in minor's best interest); *Little* v. *Little*, 576 S.W.2d 493 (Tex. Civ. App. 1979) (same); *In re Pescinski*, 226 N.W.2d 180 (Wis. 1975) (same); *In re Richardson*, 284 So.2d 185 (La. Ct. App.) (same), *cert. denied*, 284 So.2d 338 (La. 1973); *Strunk* v. *Strunk*, 445 S.W.2d 145 (Ky. 1969) (same).

would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn." *Id.* at 91.

The holding in *McFall* is consistent with the respect for individual autonomy that is a traditional element of American common law. The familiar proposition that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" [38] is "fundamental in American jurisprudence . . . ." [39] And as *McFall* and other cases illustrate, this is a "strong right," one that is strictly enforced rather than balanced against competing interests.[40]

At common law, then, the state's interest in preserving *actual* human lives, weighty though it is, is insufficient to

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[38] *Schloendorff* v. *Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.).

[39] *Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[40] *Amici* are aware of no state that has required a healthy adult to undergo a medical procedure to protect the health or save the life of another individual; such procedures may be ordered for a minor only if they are in the minor's best interest. *See supra* p. 11 n.37 (citing cases). Some courts have required parents to accept medical treatment where, in contrast to the abortion context, the required intrusion furthers *both* the state's interest in protecting the life of the parent and the state's interest in the welfare of a minor or viable fetus. Thus, courts have required parents of minor children to accept blood transfusions, *Jehovah's Witnesses* v. *King County Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968), and pregnant women at term to have cesarean sections where vaginal delivery would endanger the lives of both mother and child, *e.g.*, *Jefferson* v. *Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457, 458 (Ga. 1981). More recently, however, and correctly in *amici*'s view, courts have held that a state cannot require a woman to submit to a life-saving post-partum blood transfusion for the benefit of her minor child or other dependents, *Fosmire* v. *Nicoleau*, 551 N.E.2d 77 (N.Y. 1990); *Public Health Trust* v. *Wons*, 541 So.2d 96 (Fla. 1989), or to undergo a cesarean section if she has not (or would not have) consented to the surgery, *In re A.C.*, 573 A.2d 1235 (D.C. 1990).

justify forcing persons to endure intrusions of their bodies and concomitant health risks to save those lives. It follows, *a fortiori*, that the state's interest in protecting *potential* lives, significant though it may be, is not sufficiently compelling to justify forcing a woman to carry her fetus to term or to endure delays and obstacles to abortion that increase her health risks.

C. This Court Should Not Adopt The Undue Burden Analysis Employed By The Court Below.

In adopting what it called "the undue burden standard," the court of appeals held that strict scrutiny applies only to laws that are initially found to impose " 'absolute obstacles or severe limitations' " on the freedom of a woman, in consultation with her physician, to make a decision whether or not to continue her pregnancy. Pet. App. 14a, 24a-25a (quoting *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)). A majority of this Court has not yet adopted that undue burden standard, and it should not do so here, for three reasons.

First, such a standard is inconsistent with established constitutional principles. This Court has never required a showing of "absolute obstacles" or "severe limitations" on a fundamental right as a threshold for triggering strict scrutiny. Rather, the Court has held that fundamental personal rights and liberties are protected by the Due Process Clause of the Fourteenth Amendment from "infringement" by the States. *Stanley* v. *Georgia*, 394 U.S. 557, 564, 568 n.11 (1969). *E.g.*, *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (strict scrutiny is required for "regulations *imposing a burden* on" a fundamental right) (emphasis added).[41]

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[41] Even where the Court has used language qualifying the degrees of intrusion necessary, it has not required severe intrusions or absolute obstacles. *E.g.*, *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960) ("significant encroachment").

The effect of the undue burden standard, as applied below, is to subject state regulations that significantly burden a fundamental right to review under a mere "rational relationship" standard. Rational-relation review, while appropriate for "legislative Acts adjusting the burdens and benefits of economic life," [42] has never been accepted as adequate in reviewing legislation affecting "individual decisions in matters of childbearing" or other similarly private matters. *Carey*, 431 U.S. at 687.[43] In the abortion context, such an approach would lead to a subjective, unpredictable balancing in every case of the degree of health risk and the degree of burden that a particular state law imposes against the weight of the state's interest. Such a balancing approach is squarely rejected in analogous common law cases such as *McFall*, and should be rejected here.

Second, the undue burden test, by weakening protection of women's health and introducing an inherently subjective standard of evaluation, would simply increase the need for this Court's perennial monitoring of state abortion laws. As the Brief *Amici Curiae* of William J. Guste, Louisiana Attorney General, et al. in support of Robert P. Casey's petition for *certiorari* in this case illustrates, states are now passing legislation that returns state law to the pre-*Roe* era. Thus, a decision to adopt a weaker undue-burden/rational relationship standard of review will require this Court to resolve a host of new and diffi-

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[42] *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

[43] Indeed, the very label "undue burden" reflects the confusion this standard—as a threshold test—introduces into constitutional analysis. The threshold question is simply whether a "burden" has in fact been imposed; the question whether that burden is "undue" —*i.e.*, "unwarranted" or "unjustified"—logically should be answered only at the end of the analysis, after the state's interests and any overbreadth have been considered. This Court initially used the phrase "undue burden" to refer not to any threshold standard for triggering strict scrutiny but to the completed analysis. *E.g.*, *Bellotti* v. *Baird*, 443 U.S. 622, 647 (1979) (plurality).

cult questions. Must states allow abortion when necessary to preserve the health of the mother? Must they do so when necessary to preserve her life? Must abortion be available when the pregnancy results from rape or from incest? Is evidence that pregnancy may render a woman suicidal evidence that it poses a threat to her life? Can a state require clear and convincing objective evidence that an exception is met? Must there be an exception to criminal penalties for women and physicians who act in good faith? Such questions inevitably will arise so long as the abortion issue remains justiciable. The stakes for personal liberty are too high to expect otherwise.

Abandoning the principle that states may not place women's health at risk in regulating abortion therefore will not extricate this Court from the need to draw fine lines between what is permissible legislation and what is not. Reaffirming the basic principle that underlies *Roe*, however, would largely end this Court's oversight role. As discussed below, the Court has already resolved most of the issues that can arise under *Roe*, and has provided the lower courts with ample guidance to deal with any new legislation.

Third, there is no reason not to respect *stare decisis* here, because the principle that underlies *Roe* provides a workable standard that is consistent with constitutional precedent. *Roe* is therefore not a case that has proved "unsound in principle and unworkable in practice." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). There have been no "changes in society or in the law" since 1973 to require a reversal of *Roe*'s holding —the same concerns raised now were raised at the time *Roe* was argued (and reargued). *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986); see *Akron*, 462 U.S. at 419 n.1. Respect for *stare decisis* is thus compelling here, because it is necessary to demonstrate "that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby [to] contribut[e] to the integrity of our constitutional system of government, both in

appearance and in fact." *Vasquez*, 474 U.S. at 265-66. This Court has never before withdrawn fundamental status from any right previously recognized as fundamental. To depart from that precedent in this or any setting would so undermine accepted notions of "ordered liberty" that it should not be undertaken at all.

In sum, it is not the division of pregnancy into trimesters that determined the standard of review adopted in *Roe*. While the trimester framework was intended to and has provided helpful guidance to lower courts, the essential holding of *Roe* was that strict scrutiny was required where a state law interfered with a woman's right to decide, in consultation with her health care providers, whether or not to continue a pregnancy. That holding is valid today, just as it was two decades ago. This Court therefore should reverse the holding below adopting an "undue burden" standard of review for abortion legislation.

II. PENNSYLVANIA'S HUSBAND-NOTIFICATION, INFORMED CONSENT, PARENTAL CONSENT, MEDICAL EMERGENCY, AND DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL.

Each of the challenged provisions of Pennsylvania's Abortion Control Act is unconstitutional. In upholding all but one of these provisions, the court of appeals erroneously required a high threshold showing of an undue burden and ignored uncontroverted factual findings that each provision will cause substantial harm to women's health. The state interest repeatedly asserted in defense of these provisions—preserving the life of the fetus—is inadequate, because this Court's decisions establish that the woman's life and health must always prevail over the fetus' life and health when they conflict. *Thornburgh*, 476 U.S. at 768-69; see also *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979); *Roe*, 410 U.S. at 163-64.

A. Husband-Notification.

Section 3209 of the Act makes it a crime for a married woman to obtain an abortion unless she provides her physician a signed statement that she either has notified

her husband of her intention to obtain an abortion or has met one of four narrow exceptions to this requirement, and that she understands that a false statement is punishable by law. 18 Pa. Cons. Stat. Ann. § 3209 (1983 & Supp. 1991); Pet. App. 61a n.24, 191a-193a. As the court of appeals concluded, even if a showing of undue burden is required, this husband-notification requirement is unconstitutional.[44] This provision severely burdens a woman's fundamental right to choose an abortion without furthering any compelling state interest.

1. Husband-Notification Severely Burdens A Woman's Right To Obtain An Abortion From Her Physician.

The district court's extensive factual findings, none of which was or could be found to be clearly erroneous on this record, unambiguously support its conclusion that husband-notification imposes "a constitutionally significant burden on the woman's right to an abortion." Pet. App. 193a-201a, 254a. These findings also support the circuit court's finding that the provision imposes an "undue burden" because it "may effectively prevent the abortion or may severely penalize the woman in other ways" for choosing to seek an abortion. *Id.* at 63a. Indeed, the burden here is comparable to, if not more severe than, the unconstitutional burden imposed upon minors by the notification requirements at issue in *Bellotti* v. *Baird*, 443 U.S. 622, 647 (1979), and *Hodgson* v. *Minnesota*, 110 S. Ct. 2926, 2945 & n.36 (1990).

a. As both courts below noted, the vast majority of married women seeking an abortion have discussed their plans with their husbands. Pet. App. 66a. Section 3209 is thus targeted at, and will chiefly affect, women who fear that notifying their husbands will lead to physical or psychological intimidation or abuse.

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[44] *Amici* refer here to "husband-notification" rather than "spousal notice" because the Act's gender-neutral label is deceptive. It camouflages the fact that Section 3209 applies exclusively to women. Moreover, Section 3209 is unique; no other Commonwealth law imposes any intra-marital notice requirement. Pet. App. 199a.

For many women such concerns are all too real. Women in our society are at shockingly high risk for physical and psychological abuse by their husbands. According to one survey, nearly one in eight husbands had physically abused his wife during 1985, and almost one-third of the assaults involved severe aggression.[45] The medical community, recognizing the enormity of this problem, has efforts underway to educate health care professionals about the nature of this problem and its physical and psychological manifestations.[46]

The district court correctly found that requiring pregnant women to notify their husbands of their pregnancy and of their intent to seek an abortion will exacerbate the problem of violence against women because "pregnancy is frequently a flashpoint for battering and violence within the family." Pet. App. 196a. Studies demonstrate, for example, that as many as eight percent of women are physically or sexually abused during pregnancy.[47] In addition, abuse may take the form of actual or threatened violence to the couple's children, dissolution of a marriage, curtailment of financial support, psychological abuse (verbal degradation, food and sleep deprivation, isolation and monitoring), or disclosure of the wife's decision to family, friends and acquaintances. *Id.* at 194a, 196a, 199a.[48]

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[45] Strauss & Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 As Revealed By Two National Surveys*, 48 J. Marriage & Family 465, 470 (1986). *See also* L. Ohlin & M. Tonry, *Family Violence* 177-80 (1989) (reviewing other empirical studies).

[46] *See* American Medical Association Council on Scientific Affairs, *Violence Against Women* (1991); American College of Obstetricians & Gynecologists, *The Battered Woman* (1989).

[47] Amaro et al., *Violence During Pregnancy and Substance Use*, 80 Am. J. Pub. Health 575 (1990); Helton et al., *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1337 (1987).

[48] In addition to fostering abuse, the requirement that a woman notify her husband will jeopardize the confidential nature of the rela-

b. The narrow exception for wives who can claim that they fear "the infliction of bodily injury upon [them]" by their husband or someone else is insufficient to eliminate the burden imposed by husband notification. The exception simply does not cover the range of coercive actions that husbands in an abusive situation typically take. Moreover, as the district court found, the "coping strategy" that "most battered women" have developed, *i.e.*, "learned helplessness," leaves them without "the psychological ability to avail themselves of the exceptions of Section 3209." Pet. App. 200a-201a. Accordingly, such abuse serves both strongly to deter women from seeking an abortion and severely to penalize those who in fact go forward with notification.

c. The dissenting judge below argued that the husband-notification provision could not constitute an undue burden because it would affect, at most, only a small "percentage of all women desiring abortions" and "plaintiffs failed to show even roughly how many of the women in this small group would actually be adversely affected by Section 3209." Pet. App. 92a. The dissent's conception of what constitutes a burden on a fundamental right is erroneous as a matter of law.

Because a fundamental right is held by an *individual* against the state, the abridgment of such a right is significant even if only a small number of individuals are affected. In *Bellotti*, the Court invalidated a Massachusetts statute requiring that parents be notified of any judicial proceeding brought by their daughter to obtain an abortion. Justice Powell, in an opinion joined by then-Chief Justice Burger, then-Justice Rehnquist, and Justice Stewart, acknowledged that there was "no reason to believe" that parents would seek to obstruct their daughter's access to court "in the majority of cases where

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tionship between the woman and her physician. *See* Pet. App. 195a. Concerns about confidentiality may cause some women to delay seeking care or perhaps forgo appropriate medical care entirely.

consent is withheld." 443 U.S. 622, 647 (1979). Nevertheless, the Massachusetts law was declared unconstitutional because "[i]t would be unrealistic . . . to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it most." *Id.* Thus, this Court invalidated the statute in *Bellotti* even though it would burden only a very small proportion of the total number of women seeking abortion, and even though no precise estimate of that percentage was offered.

2. Husband-Notification Does Not Narrowly Serve A Compelling State Interest.

The Commonwealth asserts an interest in "promoting the integrity of the marital relationship." 18 Pa. Cons. Stat. Ann. § 3209(a); Pet. App. 300a. Undoubtedly, the state has an interest in the integrity of marriages; laws prohibiting bigamy or restricting the availability of divorce, for example, are constitutional. But such laws define and regulate the nature and structure of the institution; they are constitutional precisely because they do not intrude into the marital relationship itself. Marriage "is an association that promotes a way of life, not causes"; thus, state intrusions on marital relations are suspect when they promote a political agenda and particularly suspect when designed to advance the state's agenda on a matter as personal to individuals as procreation. *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965). The state cannot intrude more deeply into a marriage than when it conditions one individual's exercise of constitutional rights on an agreement to engage in state-mandated conversations with his or her spouse.

More critically, regardless of how the state's goal of promoting marital integrity is labeled, that goal is not served by forcing a husband and wife to communicate about a particular topic. As the district court found,

"[m]arital accord arises from within the relationship not from the intervention of the state." Pet. App. 262a.[49]

B. Informed Consent Provisions.

Section 3205 of the Act makes it a crime for a physician to perform an abortion unless he or she first obtains the "informed consent" of the patient as defined by detailed procedures. 18 Pa. Cons. Stat. Ann. § 3205; Pet. App. 289a. Far from promoting true informed consent, however, Section 3205 will interfere with constructive consultation between physicians and their patients and will undermine patients' health.

1. The requirement that a physician or nurse obtain a patient's informed consent to a medical procedure is fundamental to the common law and medical ethics. The doctrine is rooted in the respect for patient autonomy and the recognition that each patient is an individual with unique beliefs and needs.[50] The point of the consultation is not to inundate a patient with predetermined details on every conceivable facet of all available medical procedures; indeed, a health care provider has an obligation to limit disclosure where necessary to avoid causing the patient anxiety and fear that could jeopardize effective

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[49] The Commonwealth's other asserted interest, in promoting the husband's interests in "having children within the marriage" and in the "prenatal life" of his child, are not compelling. The interest Pennsylvania seeks to protect is only that of married men, not of biological fathers. The Commonwealth offers no explanation, however, why it is appropriate (let alone compelling) for the state to throw its weight behind one spouse and not the other on the question whether or not the wife will bear a child. In siding with one spouse and against another, the Commonwealth impermissibly intrudes into "the private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

[50] *See, e.g., Canterbury* v. *Spence*, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); T. Beauchamp & J. Childress, *Principles of Biomedical Ethics*, 74-75, 91-93 (3d ed. 1989); 1 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 18-39 (1982).

treatment of the patient.[51] Rather, the requirement that a physician or nurse obtain informed consent provides an opportunity for the provider and patient to discuss the risks and benefits of potential therapies germane to that patient, so that the patient can make an informed treatment decision. The information appropriate to each consultation will differ from patient to patient, and providers therefore do and must retain discretion to determine what specific information is relevant.

2. The procedures that Pennsylvania would require under the rubric of "informed consent" are in fact antithetical to informed consent as currently understood and practiced. To begin with, Section 3205 requires that each patient be told that (1) the State Department of Health has prepared "printed materials which describe the unborn child" and that "list agencies that offer alternatives to abortion" which the physician will provide to her "free of charge"; (2) that "medical assistance benefits" may be available to her and that the state's materials contain additional information on such benefits; and (3) that the "father of the unborn child" is liable for child support. 18 Pa. Cons. Stat. Ann. § 3205(a)(2)(i)-(iii); Pet. App. 290a.

As this Court previously held in *Thornburgh*, "[t]he printed materials required by § 3205 . . . [are] nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U.S. at 762-63. Because the Commonwealth's materials "create the impression in women that the Commonwealth disapproves of the woman's decision" to seek an abortion, bringing these materials to the attention of a woman who has already decided with her physician that it is appropriate to obtain an abor-

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[51] *See, e.g., Woolley* v. *Henderson*, 418 A.2d 1123, 1130 (Me. 1980); *Cobbs* v. *Grant*, 502 P.2d 1 (Cal. 1972) (en banc); *Roberts* v. *Wood*, 206 F. Supp. 579, 583 (S.D. Ala. 1962).

tion is misleading and can produce needless anxiety and emotional pain. Pet. App. 179a. There is "no legitimate medical justification" to recite such information to each patient, *id.*; indeed, much of the information relates to issues about which physicians or other health professionals have no special knowledge or expertise. Yet "[f]orcing the physician or counselor to present materials and the list [of state agencies] makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list." *Thornburgh*, 476 U.S. at 762-63. The forced disclosures of Section 3205 thus "serve only to confuse and punish [a pregnant woman] and to heighten her anxiety, contrary to accepted medical practice." *Id.* at 762.[52]

3. Section 3205 further intrudes on the physician-patient relationship by criminalizing the performance of any abortion until at least 24 hours have elapsed following the informed consent discussions between the physician or counselor and patient. 18 Pa. Cons. Stat. Ann. § 3205(a)(2); Pet. App. 290a. As the district court found, because of scheduling problems and the scarcity of abortion clinics, this waiting requirement will in fact impose on the majority of women seeking an abortion in Pennsylvania delays of two days to two weeks between the time a woman consents to the procedure and the time her physician is legally entitled to perform it. Pet. App. 172a. This waiting period will significantly increase the risk of death and other complications associated with abortions which correlate directly with gestational age. See *supra* pp. 3-4.

To be sure, where there is some reason to think that a particular woman needs time to reach a considered judg-

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[52] Section 3205(a) also requires the physician, to the exclusion of other qualified counselors, to supply certain information about health risks, including risks that may be irrelevant to a particular woman's situation. This Court in *Akron* held that such a requirement is overbroad, 462 U.S. at 447-49, and the Court should invalidate Section 3205(a) for this reason as well.

ment, *amici* would agree that additional time for reflection would be appropriate and the individual physician would so advise the patient.[53] But sound medical practice requires the physician to explain to the patient that any benefit of waiting must be weighed against the demonstrated increase in the risks to a woman's health caused by delay. Because the requirements of Section 3205 serve no compelling state interest but will cause harm to women, they are unconstitutional.[54]

C. Parental Informed Consent.

Section 3206 forbids physicians from providing abortions to women under the age of 18 unless the physician first obtains the informed consent not only of the woman but also of one of her parents. 18 Pa. Cons. Stat. Ann. § 3206; Pet. App. 292a. The requirement that the parent's consent be "informed" distinguishes this statute from other state statutes restricting the abortion rights of minors reviewed by this Court. Pet. App. 250a-251a. Here, even an approving parent must visit the clinic in person and sit through the mandatory anti-abortion presentation prescribed in Section 3205 before an abortion may be performed.

Section 3206 is unconstitutional because it ensures that minors will face needless and health-threatening delay in obtaining an abortion. Those minors whose parents approve will, in many cases, be delayed because of the difficulties parents face arranging an in-person visit. Pet. App. 249a. Those minors whose parents do not approve must resort to the inherently time-consuming process of obtaining permission from a state court. The adverse effect of this built-in delay is particularly acute for minors,

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[53] *See, e.g.*, American College of Obstetricians & Gynecologists, *Standards For Obstetric-Gynecologic Services* 68 (7th ed. 1989) (physician should counsel woman to take time necessary to be certain her abortion decision is the correct one).

[54] Indeed, Section 3205's waiting requirement is identical to that invalidated by this Court in *Akron*, 462 U.S. at 450-51, and should be invalidated for this reason alone.

who comprise a high percentage of women who obtain an abortion in the second trimester, where the health risks of abortion are greatest. See *supra* pp. 3-4. Because Section 3206 will impose delays on virtually all minors, and not just on those who elect to use the judicial bypass procedure, it is unconstitutional.

D. Exception For Medical Emergencies.

Section 3203 of the Act provides a definition of the term "medical emergency" applicable uniquely to abortions. The Act then incorporates this definition as an exception to the requirements of husband notification, informed consent, and parental informed consent.

As the court below recognized, *Roe* requires a medical emergency exception to any statute that regulates abortion in a way that may cause a health-threatening delay in the performance of an abortion. Pet. App. 36a. On its face, the Commonwealth's exception is inadequate. It makes it a crime for a physician to perform an abortion sooner than 24 hours after initially evaluating a patient unless the physician, in good faith, believes that an abortion is necessary "to avert [the patient's] death" or that "delay will create serious risk of substantial and irreversible impairment of major bodily function." 18 Pa. Cons. Stat. Ann. § 3203; Pet. App. 289a.

The Act's definition is notably narrow when compared to Pennsylvania's general definition of medical emergency and to sound medical practice.[55] The Act precludes phy-

[55] For all procedures besides abortion, Pennsylvania defines a medical emergency as "[a] combination of circumstances resulting in a need for immediate medical intervention." 35 Pa. Cons. Stat. Ann. § 6923 (1977 & Supp. 1991). This is consistent with the definition generally accepted by the health care community. *See, e.g.*, J. Cosgriff & D. Anderson, *The Practice of Emergency Care* 20 (2d ed. 1984) ("An emergency is an unforeseen combination of circumstances creating a condition which in the professional judgment of a physician and surgeon of good standing acting under the same or similar circumstances requires immediate care, treatment, or surgery in order to protect a person's life or health").

sicians from responding in a medically appropriate manner to women for whom pregnancy poses a health risk that, while significant, does not amount to a "*serious* risk of *substantial and irreversible* impairment of *major* bodily function." It therefore requires physicians to place the health of a woman at risk in order to further the state's interest in protecting fetal life, a "trade-off" this Court has repeatedly disapproved. *Thornburgh*, 476 U.S. at 768-69; *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979); *Roe*, 410 U.S. at 163-64.

The court of appeals upheld the definition of emergency by interpreting it liberally to include all circumstances that "*in any way* pose a *significant* threat to the life *or health* of a woman." Pet. App. 40a (emphasis added). But it is impossible to reconcile the court of appeals' interpretation with the statute's plain language. Courts, in attempting to save a statute from constitutional attack, may not engage in "judicially rewriting it." *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

The court of appeals also suggested that the statute was constitutional because the Commonwealth conceded on appeal that three common medical emergencies—inevitable abortions, premature rupture of the membranes, and preeclampsia—that do not appear to meet the statute's requirements for an emergency would in fact be considered by the Commonwealth as emergencies. Pet. App. 37a. This concession cannot save the statute.[56] First, the district court found as a matter of fact that no reasonable physician reading the plain language of the statute would believe that these medical conditions would be covered.

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[56] This concession—and this interpretation of the statutory language—is no more than a "convenient litigating position" which is entitled to no deference. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). The Commonwealth's position in this case is not binding on the Pennsylvania courts which are free to, and likely will, interpret the statute in exactly the way it is written, *i.e.*, to criminalize the medically appropriate treatment of several of the most common complications of pregnancy.

Pet. App. 162a-163a. Second, the three examples were only illustrative of a broader category of conditions that most physicians would conclude do not meet the plain language of the statute. For example, Section 3203 may prevent physicians from appropriately treating various cardiovascular, renal, pulmonary or neurologic disorders that are exacerbated by pregnancy, see *supra* p. 3 n.17, but that do not necessarily present an immediate and serious risk of irreversible impairment. These points are dispositive, because a criminal statute that is asserted to mean what no reasonable person subject to the statute would interpret it to mean is unconstitutionally vague. *Colautti*, 439 U.S. at 390-97; *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983).

Finally, the court of appeals erred in holding that the statute was constitutional because a physician can be criminally liable only if he or she "violate[s] his or her own good faith clinical judgment." Pet. App. 42a. The court's reliance on the subjective standard built into the statute simply misses the critical point that the grounds available to the physician for invoking his or her judgment are unduly narrow. Thus, a physician may, in good faith, believe that delay will cause significant risk to the patient, but not a risk of irreversible impairment to a major bodily function. The statute places that physician in an intolerable dilemma: The physician cannot, in good faith, authorize the performance of an abortion under the law, yet the physician cannot, in good conscience, and consistent with the ethical standards of the medical profession, force the woman to wait out the many delays imposed by the statute.

E. Reporting And Public Disclosure Requirements.

Physicians, nurses, and counselors who provide abortion services, and women who seek their services, regularly face picketing and verbal harassment both at their offices and their homes, harassment of their families, and periodic threats of death, bombing, and kidnapping. Pet. App. 211a-213a, 267a. The effect of such constant harassment

has been to reduce the number of health care providers willing to assist women in obtaining abortions, and to force others to take steps to preserve their anonymity. *Id.* at 219a-221a. By requiring public disclosure of the names and addresses of abortion facilities and affiliated organizations and of the number of abortions performed (total and by trimester) each quarter, and by requiring confidential reports of the names of referring physicians, Sections 3207(b), 3214(f), and 3214(a)(1) will facilitate and exacerbate this harassment, and make it difficult, if not impossible, for "indigent . . . victims of rape or incest or who suffer from a life-threatening condition . . . to obtain abortion services." Pet. App. 213a-214a, 220a-21a; see *id.* at 298a, 302a-304a.

In reversing, the court of appeals simply disagreed with the district court's factual findings. Pet. App. 79a, 82a-83a. The district court's findings are not clearly erroneous, however, and the court of appeals plainly erred in substituting its own assessment of the record for that of the district court.[57] Moreover, quite apart from *Roe*, where, as here, it is plain that state-mandated disclosure requirements can only exacerbate private threats, harassment and reprisals, those disclosure requirements cannot stand. *E.g.*, *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92-94 (1982); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

F. Criminal Penalties.

The Due Process Clause limits the degree to which states may criminally punish health care providers for assisting individuals in matters of personal choice. See generally *Doe* v. *Bolton*, 410 U.S. 179, 199-200 (1972); *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 686-91 (1977); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). The imposition of criminal penalties upon physicians who perform abortions in circumstances where continued pregnancy poses a significant risk to a woman's health (but not a defined

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[57] *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); Fed. R. Civ. P. 52(a).

"emergency") is unconstitutional. Uncertainty is an inescapable element of medicine. *Parham* v. *J.R.*, 442 U.S. 584, 604 (1979); *Addington* v. *Texas*, 441 U.S. 418, 429 (1979). When physicians are uncertain about the degree of risk that delay may present to a patient, they should choose to err on the side of protecting the health of the patient. Yet, Pennsylvania would make it a crime to do so. Such a law serves no legitimate purpose. The criminal law exists to protect the public safety, health, and welfare; where, as here, its only effect is to subvert public health, the Fourteenth Amendment precludes its enforcement.

* * * *

Each of the Pennsylvania Abortion Control Act's challenged provisions, considered individually, unconstitutionally burdens the right of pregnant women to choose whether or not to terminate their pregnancies. Viewed as a whole, however, a clearer picture emerges. This is not a statute designed to protect maternal health. Nor is it a statute intended, through good faith efforts at education and social change, to minimize the need for abortion by getting at the root causes of unwanted pregnancy. Rather, it is a statute that seeks to discourage, deter, and defeat women in their attempts to obtain abortions by replacing the provider-patient relationship and medical judgment with a procedural obstacle course fraught with criminal and civil penalties.

The most bitter irony for those among *amici*'s members who practiced medicine or nursing prior to 1973 is that restrictive abortion laws in the end will do little to reduce the number of abortions. Rather, they will shift many abortions out of the sterile confines of licensed clinics and into the back rooms of those who are willing, for a price and without regard for patient health, to defy state law. Thus, the health care provider's role in referring or performing an abortion will be replaced by their role in repairing and treating the consequences of illegal abortions. This Court rightly concluded in 1973 that the Fourteenth Amendment protects women from state laws

that compel recourse to such desperate and destructive measures, and it should reaffirm that conclusion.

CONCLUSION

The judgment challenged in No. 91-744 should be reversed and the judgment challenged in No. 91-902 should be affirmed.

Respectfully submitted,

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APPENDIX

AMICI CURIAE

Amicus American College of Obstetricians and Gynecologists (ACOG) is a private, voluntary, non-profit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its 25,000 members represent approximately ninety percent of all obstetricians and gynecologists practicing in the United States.

Amicus American Medical Women's Association, Inc. (AMWA) is a non-profit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women, or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

Amicus American Psychiatric Association (APA) is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus the American Public Health Association (APHA) is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the largest public health organization in the world with over 50,000 members. It represents all disciplines and specialties in public health, including patients and health professionals such as physicians, nurses, health educators and family planning specialists.

Amicus Association of Reproductive Health Professionals (ARHP) is an interdisciplinary professional or-

ganization comprised of over 1,500 obstetricians/gynecologists and other physicians, researchers, educators, administrators, and other professionals in reproductive health. ARHP's mission is to educate health care professionals and the public on family planning, contraception and other reproductive health issues including sexually transmitted diseases and urogenital infections, HIV, abortion, menopause, cancer prevention/detection, sexual health, and infertility.

Amicus National League for Nursing is an organization of 12,000 individuals and 2,000 agencies. It represents nurses from all settings of education and practice, as well as other health professionals and health policy makers. The league is the accrediting body for all levels of nursing schools. It works to promote access to affordable, high quality health care.

Amicus National Medical Association (NMA), founded in 1895, is a professional organization representing 16,000 Black physicians and medical students in the United States. The NMA actively addresses all issues affecting the ability of its members to deliver quality health care. It has aggressively sought to ensure equal access and availability to health care services.